

1-2700-8500-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF REVENUE

In the Matter of the Warning Notice  
of a Violation of the Minnesota Unfair  
Cigarette Sales Act,

Lloyd Currie and Sons, Inc.

Respondent,

v.

Department of Revenue

ORDER ON MOTION FOR SUMMARY DISPOSITION

By a written Motion filed on January 21, 1994, the Minnesota Department of Revenue (the "Department") moved for a recommendation for summary disposition in this matter. On February 7, 1994, Lloyd Currie and Sons, Inc. (the "Respondent") filed a Memorandum in opposition to the Department's Motion. The Motion was the subject of oral argument at the Office of Administrative Hearings on February 7, 1994. The Department filed a Reply Memorandum on February 18, 1994, when the record closed.

The Department was represented by Susan E. Fremouw, Attorney at Law, Appeals and Legal Services Division, Minnesota Department of Revenue, 10 River Park Plaza, St. Paul, Minnesota 55104. The Respondent was represented by Peter J. Coyle, Attorney at Law, of the firm Larkin, Hoffman, Daly & Lindgren, Ltd., 1500 Norwest Financial Center, 7900 Xerxes Avenue South, Bloomington, Minnesota 55431.

Based upon the Memoranda filed by the parties, the oral argument, all of the filings in this case, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY RECOMMENDED: that the Commissioner of Revenue grant summary disposition in favor of the Department of Revenue.

Dated this 24th day of February, 1994.

GEORGE A. BECK  
Administrative Law Judge

MEMORANDUM

Summary disposition is the administrative equivalent of summary judgment. Summary disposition of a case is appropriate when there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. Minn. Rules, pt. 1400.5500 K; Minn. Rules Civil Procedure, 56.03. A genuine issue is one which is not sham or frivolous and a material fact is a fact whose resolution will affect the outcome of the case. *Highland Chateau, Inc. v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) rev. den. (Minn. Feb. 6, 1985) The initial burden is on the moving party to show facts that establish a prima facie case and assert that no genuine issues remain for hearing. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). The nonmoving party must then show that there are specific facts in dispute which have a bearing on the outcome of the case. *Highland Chateau, Inc. v. Minnesota Department of Public Welfare*, supra, 356 N.W.2d at 808. General averments are not enough to meet the nonmoving party's burden. *Carlise v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988) The nonmoving party has the benefit of that view of the evidence which is most favorable to it. *Greaton v. Enich*, 185 N.W.2d 876 (Minn. 1971)

The Respondent is a cigarette distributor and wholesaler licensed by the Department to distribute cigarettes to cigarette retailers in Minnesota. Based upon a complaint from another cigarette wholesaler, the Department conducted an audit of the Respondent during the week of November 1, 1993. A review of the general ledger for the period January 1993 through July 1993 shows that a large number of payments, called "sales allowances" by the Respondent, were made to cigarette retailers who are customers of the Respondent. The Respondent's comptroller admits that the Respondent has had a longstanding practice of paying sales allowances to customers. These payments are calculated either by applying a variable rate per carton for all cartons of cigarettes purchased during a given month, or applying a percentage to the dollar amount of cigarette purchases during a given month.

The Department argues that this practice of paying sales allowances to customers is a violation of Minn. Stat. 325D.33, subd. 3, enacted in 1987, which provides as follows:

It is unlawful for a wholesaler to offer a rebate in price, to give a rebate in price, to offer a concession of any kind, or to give a concession of any kind in connection with the sale of cigarettes. For purposes of

this chapter, the term "discount" is included in the definition of a rebate.

The statute does not define the terms "rebate", "concession" or "discount". A common dictionary definition of "rebate" defines it as "a deduction from an amount to be paid or a return of part of an amount given in payment." The American Heritage Dictionary (2nd College Ed. 1982) It seems clear that the Respondent's "sales allowances" fall within this definition since they are a return of part of an amount given in payment. In a recent case, *Minter-Weisman Company v. Department of Revenue*; OAH Docket No. 69-2700-8113-2, Administrative Law Judge Steve M. Mihalchick noted that "the statutory prohibition against rebates is stark in its clarity. No such rebates are allowed." Administrative Law Judge Recommendation, page 5. Judge Mihalchick also concluded that this prohibition did not conflict with any other portions of the statute. This interpretation was adopted by the Commissioner of Revenue in an order dated December 27, 1993 and has since been appealed to the Minnesota Court of Appeals.

As a result of the audit and investigation the Department issued a formal warning letter dated December 1, 1993 to the Respondent. The letter directed the Respondent to cease paying rebates and advised the Respondent that it could request a hearing pursuant to Chapter 14 of Minnesota Statutes. By a letter dated December 10, 1993, the Respondent requested a Chapter 14 hearing as authorized by Minn. Stat. 325D.33, subd. 6.

In its written memorandum, the Respondent argues that summary disposition is inappropriate because a factual issue exists in regard to the Respondent's intent to injure or destroy competition. The Respondent argues that the language of Minn. Stat. 325D.33, subd. 1, which prohibits the sale of cigarettes at less than cost "for the purpose or with the effect of injuring a competitor or destroying competition. . . .", governs all of Chapter 325D. Therefore, it is argued that this intent should be read into Minn. Stat. 325D.33, subd. 3 also. The affidavit of Respondent's comptroller states that Respondent's intention was not to injure competition but rather to be competitive with other distributors. The Respondent also argues that there is a factual issue regarding the actual cost of the cigarettes being sold under the Respondent's sales allowance program and whether the cost violates state minimums.

In its Reply Memorandum, the Department points out that there is no intent requirement in Minn. Stat. 325D.33, subd. 3. It simply prohibits rebates. The Respondent has submitted no case law to indicate that an intent requirement should be read into a statutory prohibition of this nature. It is within the authority of the legislature to assume intent by the doing of a particular act, such as paying a rebate. Although the Respondent states that it should be permitted to submit evidence of what the actual cost of cigarettes was, with the sales allowance taken into consideration, the relevancy of this issue was decided by Judge Mihalchick and the Commissioner in the *Minter-Weisman* case by determining that Minn. Stat. 325D.33, subd. 3 could be violated

without proving a specific violation of Minn. Stat. 325D.33, subd. 1. This case is not about whether cigarettes were sold below cost, which is a violation of Minn. Stat. 325D.33, subd. 1. Such a violation requires a showing of intent since it would be possible to make an unintentional mistake. Such is not the case with a rebate, which is an independent violation. It is unlikely that a licensee would unintentionally give rebates over a long period of time. Since the two subdivisions plainly operate independently, and since 325D.33, subd. 3 is clear in its meaning, no statutory constitution is necessary or appropriate. *Tuma v. Commissioner of Econ. Security*, 389 N.W.2d 702 (Minn. 1986).

Accordingly, there are no facts in dispute that can legally affect the result or outcome of this case and therefore summary disposition is appropriate. Since the Respondent has admitted paying "sales allowances" that fall within the definition of rebate in the statute, the Department is entitled to a summary disposition as a matter of law. It is therefore recommended that the Commissioner of Revenue grant a summary disposition of this case in favor of the Department of Revenue.

G.A.B.